Supreme Court, U.S.
FILED
FEB 25 2000
CLERK

(2)

No. 99-1245

IN THE

Supreme Court of the United States

CARYL M. SHERMAN,

Petitioner,

v.

AMERICAN CYANAMID COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING/ CORPORATE DISCLOSURE

The parties to this proceeding are Petitioner Caryl M. Sherman and Respondent American Cyanamid Company. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States which requires a corporate disclosure statement, Respondent makes the following disclosure:

- American Cyanamid Company is a wholly-owned subsidiary of American Home Products Corporation, a publicly held company.

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STATEMENT OF THE CASE

Respondent American Cyanamid Company ("Respondent" or "ACC") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Caryl M. Sherman ("Petitioner"). The following facts remedy the misstatements of fact that Petitioner advances in her Petition.

In 1979, ACC hired Petitioner as a chemical sales representative. Upon Petitioner's request, she was transferred to the pharmaceutical sales division in 1988. From the inception of her work as a pharmaceutical sales representative, Petitioner received low ratings on her ability to close sales. As she continued to work in pharmaceutical sales, Petitioner continually ranked among the lowest of sales representatives in her region on a number of products. Petitioner was repeatedly counseled by her managers for her performance and in early 1994, she was placed on a performance improvement plan. During 1994, ACC restructured its sales force and eliminated several jobs. Due to her deficient performance, Petitioner was selected for downsizing and her employment was terminated. Petitioner was one of five pharmaceutical sales representatives selected for termination, both male and female, and the only representative over the age of forty selected.

Petitioner sued her former employer for sex discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.* and Ohio Revised Code Chapter 4112, age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* and Ohio Revised Code Chapter 4112, and for "sex plus age" discrimination. ACC moved for summary judgment on several grounds including

that Petitioner failed to state a cognizable cause of action in her "sex plus age" claim. The trial court granted the motion for summary judgment, holding that although Petitioner's "sex plus age" claim was a viable claim for relief, she had not met her burden of proof. Petitioner appealed asking the Sixth Circuit to recognize a new cause of action for discrimination against "older women." The Sixth Circuit declined Petitioner's invitation to create new law, holding that because Petitioner could not establish that ACC's reason for discharging her was pretextual, it was unnecessary to determine whether a "sex plus age" claim is a cognizable cause of action. Thereafter, Petitioner petitioned this Court for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION DOES NOT IMPLICATE ANY OF THE TRADITIONAL FACTORS THAT THE COURT ROUTINELY RELIES UPON IN GRANTING CERTIORARI.

Petitioner attempts to create an issue worthy of this Court's discretionary review by emphasizing the purported importance of the issue presented, i.e., whether a sex discrimination claim can be maintained under Title VII based upon Petitioner's status as an "older woman." Notably, in her Petition, she does not even mention the standards imposed by the Supreme Court for granting a Writ of Certiorari, let alone satisfy them. Rule 10 of the Rules of the Supreme Court of the United States outlines the critical factors governing the Court's review of discretionary matters. It provides:

RULE 10. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by

> this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Petition does not meet any of the Rule 10 criteria governing discretionary review because the Sixth Circuit's decision herein does not conflict with any decisions from a United States Court of Appeals, a state court of last resort, or this Court on an important federal question. In fact, no U.S. Court of Appeals, no state court of last resort, nor the Supreme Court has ever even recognized a cause of action under Title VII based on a plaintiff's "older woman" status. To date, only four district courts have recognized the viability of a "sex plus age" claim under Title VII. *See Sherman v. American Cyanamid Co.*, 996 F. Supp. 719 (N.D. Ohio 1998); *Hall v. Missouri Highway and Transportation Commission*, 995 F. Supp. 1001, 1005 (E.D. Mo. 1998); *Good v. U.S. West Communications, Inc.*, 1995 Westlaw 67672 (D. Or. 1995); *Arnett v. Aspin*, 846 F. Supp. 1234 (E.D. Pa. 1994). Ordinarily, a conflict between a U.S. Court of Appeals and a U.S. District Court does not warrant a grant of certiorari. Here, it is unclear whether a conflict even exists between the four district court decisions and the Sixth Circuit decision herein because the Sixth Circuit merely declined to rule on the issue of whether discrimination against an "older woman" should be recognized as a separate cause of action. Because one of the principle purposes for granting certiorari jurisdiction "is to resolve conflicts among the U.S. Courts of Appeals and state courts concerning the meaning of

provisions of federal law," and because Petitioner has not even alleged that such a conflict exists, the Court should deny certiorari herein. *Braxton v. United States,* 500 U.S. 344, 347 (1991).

In addition to the fact that the Petition has failed to meet any of the guidelines set forth in Rule 10 governing review on certiorari, Petitioner has also failed to establish any of the traditional criteria the Court deems important when granting certiorari. For instance, this case is not "certworthy" because alternative and independent grounds support the Sixth Circuit's decision. As succinctly stated by the Sixth Circuit:

> First of all, no Federal Court of Appeals (including this one) nor the Supreme Court has recognized such a cause of action. Furthermore, assuming without deciding that we did recognize such a cause of action, and the plaintiff could establish a *prima facie* case, the plaintiff, for the reasons stated in the previous section, was unable to prove that the defendant's reason was pretextual. Accordingly, because deciding this issue will not change the results, we feel it is unwarranted for us to do so.

Sherman v. American Cyanamid Company, No. 98-4035, *10 (Sept. 1, 1999). Therefore, even if this Court recognized a "sex plus age" claim as a viable cause of action, Petitioner's claim would still fail because she did not establish that the Company's stated reason for her discharge was pretextual. Because independent grounds support the decision below, the issue of whether discrimination can be based on an individual's status as an "older woman" is of no practical importance.

Additionally, certiorari should be denied because this issue has not "percolated" sufficiently in the lower courts. As noted, *supra,* no other United States Court of Appeals or state court of last resort has had the opportunity to fully develop the panoply of issues associated with a "sex plus age" discrimination claim. Therefore, the Court should decline reviewing this issue until it has had sufficient time to "percolate."

Moreover, Petitioner's attempt to create a new cause of action under Title VII for "sex plus age" discrimination lacks support in either legislative history or judicial precedent. In enacting the ADEA, Congress, rather than amending Title VII to add age as one of its bases for discrimination, chose instead to add the statutory prohibition against age discrimination as an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.* Congress did so after extensive hearings and consideration of the issue of discrimination against older workers as a class. No such congressional examination has been made with regard to Petitioner's proposed new separate cause of action for older women. Petitioner is essentially asking the Court to combine a classification which has been afforded protection under Title VII with one already protected under the ADEA.[1] Such a new cause of action is unnecessary as Title VII and the ADEA provide complete relief for individuals, unlike Petitioner, who can prove that gender and/or age was the determining factor in an adverse employment decision.

Petitioner's reliance on the circuit court opinions in *Jeffries v. Harris Co. Community Action Ass'n,* 615 F.2d 1025 (5th Cir. 1980) and *Hicks v. Gates Rubber Co.,* 833

1. Petitioner also misstates that "older women" have no protection under federal anti-discrimination statutes.

F.2d 1406 (10th Cir. 1987) is misplaced. Petitioner contends these decisions support the creation of a new cause of action for "older women." Yet both of those courts combined two separate classifications protected under Title VII (race and sex) in determining that the subgroup of "black women" was afforded protection under Title VII. *Jeffries,* 615 F.2d 15 1032; *Hicks,* 833 F.2d at 1416. In contrast, a "sex plus age" claim seeks to combine two separate statutory causes of action.

Petitioner's reliance on *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1972) is equally unpersuasive. Although the court recognized a cause of action for "sex-plus" discrimination in *Phillips,* it did not opine that "sex plus" protection granted by Title VII should be extended to protect another separate statutorily protected characterization like age. The lack of a fundamental underpinning for establishing a separate "sex plus age" cause of action is no less than that for creating a cause of action for sex plus any other non-Title VII statutory claim, such as disability discrimination under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.,* or even a combination of all three: "sex plus age plus disability" discrimination. Combining such statutory classifications in a case such as this is nothing more than a convenient method for an employee to avoid her lack of proof of discrimination based on a statutorily protected class. Allowing such combination enables a plaintiff to isolate herself from other similarly situated employees to the point where she becomes the only member of a combined classification, and then to argue disparate treatment. That is precisely what Petitioner attempted to do in this case, given the undeniable facts that unlike her younger, older, male and female counterparts, she was consistently a mediocre performer and that similar to

Petitioner, younger men and younger women in the her region were selected for layoff during the 1994 reduction-in-force. Given the undisputed facts, the Sixth Circuit correctly rejected Petitioner's invitation to create new law in this case.

Moreover, as discussed, *supra,* Petitioner's "sex plus age" claim was correctly decided because even if she pled a cognizable claim under Title VII, her claim still fails as a matter of law. The Sixth Circuit applied the proper law and analysis when it determined that Petitioner could not establish that Respondent's legitimate non-discriminatory reason for her termination was a pretext for discrimination.

Having no other viable reasons to justify a grant of certiorari, Petitioner attempts to manufacture a "certworthy" issue by stressing the purported importance of the issue presented. This Court has stated, however, that "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Montrosa, et al. v. Carbon Black Export, Inc.,* 359 U.S. 180, 184 (1954). This case does not rise to the level of "meaningful litigation" because Petitioner cannot establish that the Company's stated reasons for its employment decisions were pretextual. Moreover, the purported importance of this issue loses credibility because "older women" are already afforded protection from discrimination by Title VII and the ADEA.

Because Petitioner cannot establish a compelling reason to grant certiorari, the Petition should be denied.

II. CERTIORARI SHOULD BE DENIED BECAUSE SECTION 2 OF THE PETITION MERELY ASKS THE COURT TO REVIEW FACTUAL FINDINGS AND THE APPLICATION OF PROPERLY STATED LAW.

Petitioner's assertions in Section 2 of her Petition also fail to raise a "certworthy" issue. In Section 2, Petitioner asks the Court to exercise its supervisory power on the grounds that the Sixth Circuit inappropriately refused to address the issue of whether a "sex plus age" claim is viable under Title VII. Petitioner cannot, however, establish that the Sixth Circuit's decision "has so far departed from the acceptable and usual course of judicial proceedings . . . to call for an exercise of this Court's supervisory power." *Rules of the Supreme Court of the United States, Rule 10.* In essence, the Sixth Circuit simply declined to address a moot issue which hardly implicates the Court's supervisory power. Historically, courts have refused to opine on moot issues and the Sixth Circuit's refusal to do so does not justify discretionary review herein.

In her question presented, Petitioner also improperly asks this Court to engage in a fact-based assessment of the evidence on pretext. She asks the Court to consider "relevant evidence regarding the issue of pretext in [her] sex plus age claim that was not addressed by the Court of Appeals." (Petition for Writ, pp. 9, 10). Yet the Sixth Circuit did address that evidence when it succinctly stated in its analysis of pretext on Petitioner's age discrimination claim that "the only evidence [of pretext] to which the plaintiff can arguably point are two comments by her supervisor. . . ." *Sherman v. American Cyanamid Company,* No. 98-4035, *8 (Sept. 1, 1999). As part of her age discrimination claim, Petitioner

argued to the Court of Appeals that a number of sales representatives, younger women and younger and older males, including Fred Karm on whom Petitioner now relies, were treated more favorably than her. As in the district court, the Sixth Circuit rejected all of this alleged evidence of more favorable treatment as demonstrating pretext for age discrimination, applying clearly established standards for proving pretext. In analyzing Petitioner's "sex plus age" discrimination claim, the Court also rejected that same alleged evidence of more favorable treatment of those individuals, including Karm, as establishing pretext. Having had this alleged evidence twice rejected, Petitioner is now asking the Court to engage in a fact-based assessment of the Court of Appeals decision.

As noted in Rule 10, "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Here, Petitioner's contentions do not warrant review because she merely questions the Sixth Circuit's application of well-established precedent on pretext in discrimination actions. *See Ercegovich v. Goodyear Tire & Rubber,* 154 F.3d 344 (6th Cir. 1990); *Manzer v. Diamond Shamrock Chem. Co.,* 29 F.3d 1078 (6th Cir. 1994). Despite Petitioner's contentions, the Sixth Circuit's decision herein was decided upon a correct application of settled law.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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